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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ALEJANDRA P., et al., Persons
Coming Under the Juvenile Court Law.

B219395
(Los Angeles County
Super. Ct. No. CK 65727)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

C. C.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County.
Stephen Marpet, Juvenile Court Referee. Affirmed.

Joseph D. Mackenzie, under appointment by the Court of Appeal, for
Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant
County Counsel, and Jeanette Cauble, Senior Deputy County Counsel, for Plaintiff and
Respondent.

C.C., the mother of Pablo, Alejandra and Sebastian, appeals from the order denying her third Welfare and Institutions Code section¹ 388 petition without a hearing, contending the court abused its discretion when it did so. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Prior Background

Prior to juvenile court intervention, the Department of Children and Family Services (Department) worked with the family on a voluntary basis after allegations arose that Pablo physically abused Sebastian. One month later, a second referral alleged Pablo and Alejandra were victims of neglect by appellant and appellant had overdosed on pills and been admitted to a psychiatric emergency hospital.

On December 8, 2005, the Department opened a voluntary family reunification case. The children were placed in foster care while appellant worked on her service plan, which included parenting education, group therapy, individual therapy and medication therapy. Appellant complied with the service plan, and the children were returned to her custody in June 2006.

For two months, the voluntary services went very well. In August, the social worker (CSW) met father² for the first time; he had been deported to Mexico and just returned to the United States. Appellant's therapist informed the CSW that appellant had missed two therapy appointments. Department records showed there was a history of violence between the parents and father had a history of substance abuse. Appellant admitted she was afraid of father, who had threatened to take Sebastian from her.

Pablo and Alejandra said they wanted father to stay away and reported father used drugs in their presence and hit appellant.

¹ All statutory references are to the Welfare and Institutions Code.

² Father is the father of Sebastian only.

In September, appellant told the CSW that she and father had been arrested for domestic violence; father had followed her home and tried to take Sebastian. Appellant hit father, and he slapped her. Pablo called the police. In October, appellant again admitted she was afraid of father as he had threatened to take Sebastian and harm her. Appellant tried to keep father out of the house, but he refused to leave and was violent.

On November 9, the Department conducted a team decision making (TDM) meeting and devised a safety plan for the family.

II. Detention

On November 15, 2006, the Department filed a section 300 petition on behalf of the children alleging domestic violence between the parents and father's history of illegal drug use. At the time, Pablo and Alejandra were teenagers and Sebastian was almost two years old. At the initial hearing, the court ordered the children released to appellant.

In January 2007, the Department reported the family had an extensive history of referrals for child abuse or neglect dating back to 1998.

Pablo told the investigator that appellant and father had many fights in which they hit each other; they fought over Sebastian and would physically pull the baby from each other. Pablo did not believe Sebastian was ever hurt, but the fights were "nasty" and resulted in bruises to appellant's face. Pablo confirmed that father used cocaine and crystal methamphetamine when he lived with them and used drugs in the children's presence. Alejandra said appellant knew about father's drug use.

III. Jurisdiction/Disposition

The matter was successfully mediated, and the parents agreed to modified language in the section 300 petition. Appellant was allowed to retain custody of the children with family maintenance services; she was ordered into parenting classes,

individual counseling to address domestic violence, co-parenting with father and a 52-week domestic violence group program.

On June 28, 2007, the Department filed a protective custody warrant request for the children because appellant, who had not yet begun her service plan, took them to New York. The court issued the warrants.

In July, the Department filed a section 342 petition because appellant was not participating in her service plan, the children were not attending school regularly and appellant had taken the children to New York contrary to court order. The children were returned to California, detained from appellant and placed in foster care. In addition to neglecting the children's schooling, appellant failed to ensure their mental health needs were being addressed. Alejandra was dropped from individual therapy due to excessive absences.

In August, the Department reported appellant had re-enrolled in individual counseling (but had slipped back into a depressive state), returned to domestic violence counseling and attended all visits with the children. Appellant did not have stable housing and was living with her sister.

After a mediated agreement regarding the section 342 petition, which was deemed a section 387 petition, the court sustained the petition as amended, removed the children from appellant's custody, and ordered reunification services for appellant.

For the January 2008 hearing, the Department reported appellant had finally started complying with her service plan; she had completed individual counseling, attended 38 of 52 sessions of domestic violence classes, taken her psychotropic medications and seen her psychiatrist on a monthly basis, but she continued to be dependent on father.

Alejandra was doing well in school. After the children were placed in foster care, they attended counseling on a regular basis and made progress in their therapy.

Although appellant consistently visited the children, the monitor reported appellant often did not focus on Sebastian and he would wander off out of her sight.

Appellant expected the children to pay for her lunch out of their allowance if the visits occurred at McDonald's.

The court ordered further reunification services for appellant and ordered the Department to facilitate conjoint counseling between appellant and Pablo and Alejandra with visits at least twice a week.

For the May review hearing, the Department reported appellant lived with father and continued to work for him. Pablo was hospitalized for suicidal ideation and complained about his treatment in the foster home. All the children were removed from that home, and Alejandra and Sebastian were placed together.

Although the children were supposed to have weekly visits with appellant, they had not seen her for nearly two months. Appellant went to Mexico to be with father and was unable to return to the United States because she was undocumented. Appellant's behavior continued to be of concern; she was reportedly emotionally unstable. Appellant's therapist stated appellant had not made progress in the program and the therapist was concerned appellant's erratic behavior would be detrimental to the children. Appellant's unstable behavior continued after she went to Mexico, she often called the CSW, displaying erratic mood swings. The Department recommended terminating appellant's reunification services.

Alejandra continued to receive individual counseling and was making progress. The foster mother indicated a willingness to adopt Alejandra and Sebastian.

Appellant returned from Mexico and was present for the May review hearing, which was continued to June for a contested hearing. Prior to that hearing, appellant provided evidence she had completed individual counseling, parenting classes, domestic violence classes, and had been receiving psychiatric services after being diagnosed with a mood disorder.

Appellant's visits with the children were problematic. On May 24, appellant became so emotionally unstable that a visit with Alejandra and Sebastian had to be terminated. Appellant told the children that if the judge did not give her a second chance,

she wanted to die. Alejandra was so distraught about appellant, she told the CSW she also did not want to live.

After the hearing, the court ordered the children to remain in out-of-home care and terminated appellant's reunification services. The court noted that appellant needed to learn from her domestic violence classes how to prevent it and what effect it had on her children. The court stated appellant had not learned anything from that program as she went to Mexico to live with the perpetrator of the domestic violence. The court indicated there were "other overlaying issues of your mental health that need to be addressed."

In September, Pablo, who had turned 18, said he no longer wanted to be under the jurisdiction of the juvenile court. Alejandra and Sebastian were doing well in their current foster home. Alejandra stated that at some point she wanted to live with appellant or her maternal grandmother.

Alejandra and Sebastian had been placed in new foster homes on several occasions due to appellant's aggressive behavior toward the foster parents. In August, Alejandra and Sebastian had to be moved once again from a foster home they liked because the foster mother could no longer tolerate appellant's aggressive and rude behavior.

IV. Section 388 Petitions

The Department filed a section 366.26 report in September indicating that although the current foster mother was experiencing problems with appellant, the foster mother was willing to continue to care for Alejandra and Sebastian. Even though there was no identified adoptive parent for Alejandra, the Department assessed her as adoptable. A family had been interested in adopting Alejandra, but after problems were identified, they decided not to proceed with the adoption. Sebastian, who had an identified prospective adoptive family, had been assessed as adoptable. Appellant maintained regular weekly monitored visits with the children.

Appellant filed her first section 388 petition on September 29, 2008, requesting return of the children to her care or, in the alternative, reinstatement of reunification services. Appellant included a progress report from Management Solutions Group indicating she had re-enrolled in domestic violence, parenting classes and individual counseling, had attended 14 sessions of each, and was making progress in her programs. A letter from Rio Hondo Mental Health stated appellant was seeing a psychiatrist and taking psychotropic medication for her depression.

At the hearing, counsel for the children advised the court that Alejandra objected to being adopted, noted Alejandra and Sebastian had been deemed a sibling group, objected to the children being separated, and asked the court that they not be placed in different foster homes.

The court summarily denied the petition stating that it was not in the children's best interests at that time. The court indicated appellant needed to do better with her contact with the children and observed that complying with the case plan was one thing, but how appellant was handling the children was another. The court ordered the Department to consider legal guardianship or permanent living arrangement for both children as Alejandra did not want to be adopted and the children were a sibling group. The court ordered the Department had discretion to liberalize appellant's visits.

Appellant filed a second section 388 petition on March 18, 2009.³ Appellant asserted she had taken all of her programs over again and completed them, continued to take her psychotropic medication, was engaged in conjoint counseling with Pablo and Alejandra, was gainfully employed and had stable housing. Appellant provided documentation for her claimed change in circumstances. The court granted a hearing on appellant's second petition and gave the Department discretion to liberalize appellant's visits.

³ In March, the court terminated jurisdiction over Pablo.

The Department filed a response to the petition noting it had held a TDM meeting on May 8 to address the second petition and case issues, including appellant's behavior during visits. During the meeting, appellant revealed she had stopped taking her medication, lost her job and was living in a women's shelter. On April 18, appellant had been hospitalized and diagnosed with depression and auditory hallucinations and was suicidal. Although appellant was discharged on April 24, her prognosis was guarded and she was advised to attend Rio Hondo Mental Health Clinic. Appellant was prescribed Lexapro and Benadryl, but she preferred Abilify so she borrowed some from her brother.

On May 14, appellant reported she had her medications refilled and was interviewing for jobs, was living with maternal grandmother until she would get her own apartment, and had stopped therapy (but would resume therapy if the court ordered her to do so). The children's foster mother reported appellant continued to be impolite to her and it had gotten to the point that foster mother advised appellant to ask for the children to be removed from foster mother's home if appellant was so dissatisfied with foster mother's care of the children.

At the hearing, appellant's counsel stated appellant would like to testify that she had an emotional relapse due to losing her job and home, but she now had appropriate housing, was looking for a job and was back in counseling and taking her medications. The court accepted counsel's statements as offers of proof, but stated it did not believe they would make any difference as it was not in the children's best interests to grant the second petition. The court stated the issues raised in the report, such as appellant's hospitalization, were problems appellant had to live with, but the children needed some stability in their lives; the children's counsel agreed with the court. The court continued the section 366.26 hearing to September 25.

On September 21, appellant filed her third section 388 petition again requesting return of the children or reinstatement of reunification services and "unmonitored visits leading to day unmonitored visits leading to overnight and weekend visits leading to eventual return." Appellant stated she was taking her medication as prescribed, she was

under the care of a psychiatrist, had stable housing, and the children wanted to live with her. A letter from Full Service Partnership indicated appellant had been accepted into its program on August 12 for “case management, medication support, intensive mental health services, and additional related services.” The other documentation attached to the third petition had already been presented to the court in connection with appellant’s second petition.

The Department filed another section 366.26 report noting Alejandra and Sebastian had lived in their current foster home for 13 months, Alejandra was content with her placement and liked her current school, but the foster mother was unable to provide a more permanent home due to Sebastian’s behavior. Sebastian often displayed anger, had been defiant at home and school, and struck foster mother and other children. The Department continued to assess both children as adoptable and had found a potential match, but there was a delay with presenting the children to the family. The Department was continuing to work on the issue.

Appellant visited the children regularly; the foster mother reported Sebastian was indifferent toward appellant and preferred to play with others. When Sebastian needed reassuring, he sought out foster mother. Alejandra told the adoption worker she wanted to be adopted, but was only willing to be adopted if she could stay in her same school and maintain her same friendships and community. Sebastian stated he wanted to reside with Alejandra. At the hearing, counsel for the children reiterated Alejandra did not want to be adopted.

The court summarily denied the third section 388 petition stating it failed to state new evidence or circumstances and the proposed change was not in the children’s best interests. The court expressed concern that the Department report continued to mention adoption even though Alejandra had stated she did not want to be adopted.

Appellant filed a timely notice of appeal from the court’s order denying her third petition.

DISCUSSION

A section 388 petition requires a showing (1) that a change of circumstances warrants a change in a prior order of the juvenile court and (2) that the requested change is in the best interests of the child. (Cal. Rules of Court, rule⁴ 5.570(e); *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) Appellant contends the court abused its discretion when it found her circumstances had not changed and her requested modifications were not in the children's best interests.

“If the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing. ‘The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing.’ ‘A “prima facie” showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.’” (Citations omitted.) (*In re Daijah T.*, *supra*, 83 Cal.App.4th at p. 673.)

However, a party filing a section 388 petition is not automatically entitled to a full hearing on the motion. If the petition fails to state a change of circumstance that might require a change order, the court may deny the application ex parte. (Rule 5.570(d).) “The petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion.” (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; see also *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451 [The denial of a petition without a hearing is reviewed for an abuse of discretion keeping in mind “the change of circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged prior order.”].)

Whether a parent made a sufficient showing entitling her to a hearing “depends on the facts alleged in her petition, as well as the facts established as without dispute by the

⁴ All rule references are to the California Rules of Court.

court's own file.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) In addition, “[w]hen custody continues over a significant period, the child’s need for continuity and stability assumes an increasingly important role.” (*Id.*, at p. 464.) The burden of proving changed circumstances is particularly difficult after reunification services have been terminated as they have in this case. (*Ibid.*)

Appellant asserts her circumstances had changed because she ended her relationship with father, completed all her counseling programs for the second time and maintained regular weekly contact with Alejandra and Sebastian. Appellant also argues the evidence available in her third petition demonstrated the children’s best interests would be served by granting an evidentiary hearing on her alternative requests. Appellant posits the court failed to consider fully and carefully each of the alternative modifications she proposed in her third petition.

In her third petition, appellant requested the children be returned to her care or reunification services be reinstated and visitation be unmonitored. At the hearings on September 30, 2008, and March 27, 2009, (when the court denied the first section 388 petition and granted a hearing on the second petition respectively), the court gave the Department discretion to liberalize appellant’s visits. Hence, appellant had the option of requesting increased visitation prior to filing the third petition.

Appellant claims the change of orders was in the children’s best interests because the foster care system has not afforded the children permanency or stability noting that they had been in four foster placements and, even though they had been in their current foster home for 13 months, the foster mother was unable to provide a more permanent home due to Sebastian’s behavioral problems at home and at school. However, the main reason for the changes in placement had been the foster parents’ inability to deal with appellant’s aggressive and rude behavior. Thus, the lack of stability was due to appellant’s actions not the failure of the dependency system.

Appellant suggests her regular visitation and ongoing contact was the children’s only continuous, stable and permanent caregiving relationship, especially in the face of

their impending removal from yet another foster placement. Appellant asserts the situation is further complicated by the fact Alejandra wants to continue attending her current high school and living in her current community and Sebastian wants to continue living with his sister.

Appellant's reunification services had been terminated due in part to her erratic behavior. That erratic behavior continued after her services were terminated in May of 2008. During these proceedings, appellant took the children to New York, neglected their schooling and failed to address their mental health needs. At one point, appellant followed father to Mexico and had difficulty getting back into the country as she was undocumented. Even though appellant visited regularly, she did not focus on Sebastian and he was indifferent to her during the visits, preferring to interact with others.

When the court denied appellant's first section 388 petition as not being in the children's best interests, it stated that complying with programs was one thing and knowing how to handle problems was another thing. The court noted the children were not going to be adopted, and stated the long term goal was for appellant to get them back.

When the court denied the second petition also for not being in the children's best interests, it noted appellant had problems and the children needed stability. A month after appellant filed the second petition, she had to be hospitalized for psychiatric conditions, including suicidal ideation. In addition, she had stopped taking her medication, lost her job, was living in a women's shelter and been diagnosed as depressed; her prognosis was guarded and she was advised to attend a mental health clinic. Although appellant had been prescribed certain medication, she borrowed her brother's medication. As of May 14, appellant was living with her mother, did not have a job and was not in individual counseling. The court was aware of those facts when it denied the petition on May 18. Appellant did not appeal the denial of her second petition.

Appellant's third section 388 petition contained almost the same justification for her requested changes (with the addition she was under the care of a psychiatrist and the children wanted to live with her) and her documentation was the same except for an

additional letter from Full Services Partnership indicating appellant had been accepted into its program on August 12, a very recent development. Appellant did not demonstrate consistent stability. In other words, even though the court denied the petition without a hearing on September 25, there was no evidence of any significant change since it denied the second petition.

The children had been under the Department's supervision in one form or another since December 2005. Thus, given appellant's history of mental health problems and inconsistent employment and housing during that time, her third petition showed at best changing circumstances. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 49.) Accordingly, the court did not abuse its discretion in denying the petition without a hearing.

DISPOSITION

The order is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.